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Supreme Court, U.S.
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No. 08-786

IN THE

Supreme Court of the United States

SUE CODY, OZZIE BROWN, DELORIS LUNDY, SHAUNA BAUGH, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, PETITIONERS

v.

GOLD KIST, INC.,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where an employer issued a written report admitting company-wide gender discrimination, was it error for the Court of Appeals to require Petitioners to adduce additional evidence of pretext?

2. Whether the Court of Appeals improperly decided a disputed material fact in violation of F.R.Civ.P. 56(c) and in conflict with this Court's decision in *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986) when it credited the employer's *post hoc* assertion that its own Task Force Report stating *inter alia* that there was gender discrimination at Gold Kist, Inc. and that qualified females were not considered for promotion, was merely "evidence of employee perceptions of gender related problems" despite testimony and contemporaneous emails from Task Force Committee members stating that the Task Force Report was in fact the Task Force Committee's "findings".

3. Whether a Plaintiff may establish gender discrimination by ordinary standards of proof sufficient to withstand a motion for summary judgment, without having to establish a *prima facie* case under *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973) where the employer issued a written report admitting to company-wide gender discrimination.

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OPINIONS BELOW

The judgment of the United States Court of Appeals for the Eleventh Circuit is dated April 25, 2008, and is not published. (App. 1a-3a) The Order denying Petitioners' Petition for Rehearing En Banc is dated July 14, 2008 (App. 4a-50a). The Order of Judge Richard Story granting Respondent's motion for summary judgment is not reported in the Federal Reporter. (App. 51a).

JURISDICTION

The decision of the United States Court of Appeals for the Eleventh Circuit, affirming the decision of the district court granting Respondent's motion for summary judgment, was filed on April 25, 2008. A timely petition for rehearing en banc was denied on July 14, 2008. By Order dated October 9, 2008, this Court granted Petitioners' motion to extend the time to file this Petition for Certiorari to December 11, 2008.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

RELEVANT PROVISION INVOLVED

Federal Rules of Civil Procedure 56(c):

> **Rule 56. Summary Judgment**
>
> . . . .
>
> (c) **Serving the Motion; Proceedings.** The motion must be served at least 10 days before the day set for the hearing. An opposing party may serve opposing affidavits before the hearing day. The judgment sought should be

rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.

STATEMENT

On or about November 8, 2000 Respondent, Gold Kist, Inc. (hereinafter "Gold Kist") issued *its own* Task Force Report stating *inter alia*, that: 1) "qualified female employees not considered for promotion"; 2) "female new hires paid at a lower salary/position than male new hires"; 3) "lack of respect for females"; and 4) "Gender bias throughout Gold Kist". (Ex. 187 to Tudor Dep.) In addition to identifying Problems and Root Causes, the Task Force Report also set forth specific Target Dates for Action Items with respect to each identified problem.

At all relevant times, Petitioners Sue Cody, Deloris Lundy and Ozzie Brown were employed in Gold Kist's Information Services ("IS") Department. In or about August 2000, Gold Kist's CEO, Gaylord Coan, had instructed Michael Stimpert, Gold Kist's Senior Vice President, Planning and Administration, to look into complaints of gender discrimination. (Stimpert Dep. 10, 11).

Mr. Stimpert decided to set up a Task Force to consider the issue of gender discrimination in Gold Kist. (Stimpert Dep. 21-23). Mr. Stimpert appointed Renee DeBar as the chairperson of the Task Force, (Stimpert Dep. 70), and Pat Tudor, a member of the IS Department, had an informal leadership role. (Stimpert Dep. 73). Stimpert met with Ms. DeBar and Ms. Tudor

to monitor the progress of the Task Force.(Stimpert Dep. 72-73).

The Task Force Report was presented to the IS female employees on October 23, 2000. (Tudor Dep. 93) Mr. Stimpert attended this meeting. (Tudor Dep. 93). Neither Mr. Stimpert nor Harry McDonald, Gold Kist's VP of Human Resources (Stimpert Dep. 9, Stimpert Affid., ¶2 attached as Pl Ex. 89 to Stimpert Dep.; McDonald Dep. 9, 15), stated at the meeting that the statements in the Task Force Report were assumptions. Nor did Mr. Stimpert say at the October 23, 2000 meeting that the wording of the Task Force Report should be revised to indicate that the problems that were identified were assumptions. (Tudor Dep. 93-98).

After the October 23, 2000 meeting at which the October 23, 2000 Task Force Report was handed out to the female employees of the IS department, there was a meeting in which the Report was handed out to the department as a whole. (Tudor Dep. 101).

There was a Task Force Report dated November 7, 2000. (Tudor Dep. 105). Ms. Tudor made notations to this report (Tudor Dep. 105). There is no language in this report indicating that any of the statements reflecting gender discrimination were only assumptions. (Tudor Dep. 105-08). The same is true of the Task Force Report dated November 8, 2000. (Tudor Dep. 109-110).

Ms. Tudor testified that she was not sure of the date of the meeting at which the Task Force Report was handed out to the entire department. The November 8, 2000 Task Force Report is almost identical to the November 7, 2000 Task Force Report. (Ex. 187 to Tudor Dep.; and Ex. 94 to Stimpert Dep. respectively).

Mr. Stimpert and Mr. McDonald have both conceded that one could read the Task Force Report as indicating that the items contained therein concerning gender bias were factually based. (Stimpert Dep. 101-102, McDonald Dep. 55). The Task Force Report contains no notations or disclaimers to indicate that the contents of that report did not amount to any findings or conclusions of the Task Force related to the gender bias problems and issues identified therein. (Stimpert Dep. 100-101; McDonald Dep. 52-53). Mr. Stimpert admitted that the Task Force promulgated The Task Force Report without any disclaimers. (Stimpert Dep. 103).

In an October 3, 2000 email, Ms. Tudor wrote, "*Now that the task force has looked at the issues in an objective manner*, I believe that the entire department should be presented with our *findings*. . ." (Ex. 201 to Tudor Dep. [Tudor Affidavit containing exhibits thereto], Ex. 16 thereto) (Emphasis added). Ms. Tudor conceded at her deposition that when she used the word "findings" in this e-mail she was attempting to be truthful. (Tudor Dep. 80 - 83). Neither Mr. Stimpert, nor Renee DeBar, nor anyone else sent Ms. Tudor a responsive email or in any other way communicated to her that her use of the term "findings" was inappropriate. (Tudor Dep. 81-82).

There were at least three preliminary drafts of the Task Force Report, which Stimpert and McDonald reviewed. (Stimpert Dep. 50, 91 - 94; Stimpert Affidavit, Par. 18, attached as Ex. 89 to Stimpert Dep.). Mr. Stimpert reviewed each of the three drafts carefully and made any notations that he thought were necessary. (Stimpert Dep. 95-97). Mr. McDonald also made final revisions to the Task Force Report before the final Task Force Report was issued. (McDonald,

Dep. 50). There is no statement or disclaimer on any of Mr. Stimpert's or Mr. McDonald's revisions stating that the Task Force Report was only "a survey", and did not amount to the Task Force's findings. And even after reviewing several preliminary versions of the October 23, 200 draft, Mr. Stimpert did not suggest that any disclaimers or explanations of the "context" be added to the November 7, 2000 report. (Stimpert Dep. 103). This was after Ms. Tudor had earlier referred to the Task Force's "findings" in her October 3, 2000 e-mail to Stimpert.

On December 5, 2000 Mr. McDonald sent a memo to "Task Force Participants" stating that some of the target dates indicated in the Task Force Report were being revised. (Ex. 103 to McDonald Dep.) Mr. McDonald's December 5, 2000 memo lists the original target dates for numerous "action steps" and new dates which were being implemented. (*Id.*).

On January 15, 2001 Mr. McDonald issued a memo to "Task Force Participants" regarding "Task Force Report Periodic Follow Up" updating the Task Force participants on the progress that had been made toward the Action Steps set forth in various sections of the Task Force Report. (Ex. 101 to McDonald Dep.)

When the EEOC attempted to investigate the basis for Gold Kist's Task Force Report, Gold Kist refused to cooperate, resulting in EEOC findings of probable cause with respect to each of Petitioners' EEOC charges. (Ex. 3 to Amended Complaint, R. 3). Thus, the EEOC found as follows:

> A review of available records indicate salary and promotion disparities that affects women as a class. Furthermore, the evidence indicates the pattern and practice has continued after an

> alleged reorganization and reclassification of positions.
>
> The Respondent in this matter was provided two separate opportunities to respond to the allegations brought by the Charging Party[ies]. The Respondent was specifically informed that it risked an adverse determination should it not respond, and has chosen not to exercise its right to rebut the Charging Party's [Parties'] allegations.
>
> Inasmuch as the Respondent has been afforded every opportunity to respond to the charge of discrimination and had failed to do so, the Commission at this time determines that the Respondent has failed to meet its burden of proof, and that said silence is an admission of the allegations made and exercises its discretion to draw an adverse inference with respect to such.
>
> Based on this analysis, I have determined that the evidence obtained during the investigation establishes that it is more likely than not that the Charging Party [Parties], as well as the class, was discriminated against in violation of the statute.

The District Court found that Petitioner Sue Cody had established a *prima facie* case of gender discrimination regarding failure to promote and pay disparity and that Petitioner Deloris Lundy had established a *prima facie* case of gender discrimination regarding pay disparity. The District Court found that

Petitioner Ozzie Brown had not established a *prima facie* case of gender discrimination.

There was federal question jurisdiction in the District Court based upon Petitioners' Title VII causes of action.

REASONS FOR GRANTING THE PETITION

In this case there was no dispute as to the admissibility of Respondent's Task Force Report, so that the weight to be accorded to that Report was uniquely within the province of the jury, and not the court, on Respondent's motion for summary judgment. The Court of Appeals improperly invaded the province of the jury when it required Petitioners to adduce evidence "to contradict the statements of management and Task Force members regarding the manner in which the report was generated" (p. 2 of Court of Appeals' opinion) precisely because the *face* of the Task Force Report constituted an admission of unlawful gender discrimination, so that the dispute between the parties about what the Task Force Report meant, was one to be resolved by a jury under F.R.Civ.P. 56(c) and *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986).

There was a conflict between the Respondent's *post hoc* assertion that the Task Force Report was merely an "opinion survey", and other evidence, including emails and statements of the Task Force Committee members, that the Task Force Report constituted the Task Force Committee's "findings". Thus, the contemporaneous writings of the Respondent's own Task Force Committee members reflected *their* understanding that the Task Force Report represented the Task Force Committee's findings.

This case is about the Respondent, Gold Kist, Inc. running away from its own Task Force Report which found that gender discrimination existed throughout the company. It is undisputed that 1) Gold Kist upper level management organized a Task Force in 2000 to consider the issue of gender discrimination, 2) the Task Force issued a Task Force Report in October/November 2000 stating that gender discrimination existed throughout Gold Kist, and 3) Gold Kist took company-wide action based upon the Task Force Report.

The Task Force Report was reviewed and approved by Gold Kist's upper level management after a deliberate and carefully thought out process. The Task Force Report went through several drafts, each of which were "vetted" by Michael Stimpert, Senior Vice President for Planning and Administration – who reported directly to Gold Kist's CEO – and by Harry McDonald, Gold Kist's Vice President of Human Resources.

The Task Force Report was approved and published by Gold Kist without any disclaimers suggesting that the findings contained in the Report should not be taken at face value. The content of the Task Force Report is unambiguous in its findings that 1) "qualified female employees not considered for promotion"; 2) "female new hires paid at a lower salary/position than male new hires"; 3) "lack of respect for females"; and 4) "Gender bias throughout Gold Kist".

The methodology used by the Task Force members in arriving at those conclusions was immaterial when deciding Gold Kist's motion for summary judgment, especially where, as here, Gold Kist viewed the process and report as a sufficient basis

upon which to implement corrective action to address gender discrimination according to a specified timetable. Accordingly, it would have been reasonable for a *jury* to conclude that Gold Kist believed what it now claims are merely assumptions, since it decided to act based upon the Task Force Report. To the contrary, it defies credulity to believe that Gold Kist disbelieved the Task Force Report, but decided to implement remedial action anyway. In effect, Gold Kist's position is that while ***it*** was entitled to credit and act upon its Task Force Report, the District Court and a jury may not.

Michael Stimpert instructed Sheila Walters to interview each of the female IS employees. (UMF, Cody, No. 162[1]). "She will ... compile all of this information along with information that we have from other interviews, written communications, etc. that we have gathered from the past" (Ex. 1 to Stimpert Affid., attached as Ex. 89 to Stimpert Dep.) This document goes on to say, "we must have no lingering issues to haunt us after we implement our action plan." (*Id.*) The document continues," Once the information is compiled, we will have a meeting to present the *findings*." (*Id.*, Emphasis added.). The contemporaneous notes of Pat Tudor, a Task Force member similarly reflect that the Task Force was going to reach conclusions after its investigation of gender issues. Thus, Ms. Tudor's contemporaneous notes contained in Exhibit 10 to her Affidavit attached as Exhibit 201 to her Deposition reflect her understanding of the process as an "investigation". Thus Ms. Tudor wrote in those notes, "Complaint from Info Svcs. Started investigation."

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[1] Gold Kist's Statement of Undisputed Material Facts regarding Sue Cody, No. 162.

And in an October 3, 2000 email, Ms. Tudor wrote, "*Now that the task force has looked at the issues in an objective manner*, I believe that the entire department should be presented with our *findings*. . ." (Ex. 201 to Tudor Dep. [Tudor Affidavit containing exhibits thereto], Ex. 16 thereto) (Emphasis added).

The fact that the Task Force Report and the Task Force process included the use of the terms "investigation" and "findings", while not necessarily conclusive as a matter of law, nevertheless provided ample record evidence from which a jury reasonably could find that the Task Force Report was in fact the result of a deliberative process and that its statements constitute findings. The fact that the District Court and Court of Appeals were disinclined to come to those conclusions was immaterial, since it was beyond the province of the District Court to make factual findings or to draw inferences from the evidence favorable to the moving party when deciding Gold Kist's motion for summary judgment.

Given this unique record of an employer admitting that it had discriminated against its female employees as a class, and taking company-wide action in response to its report containing such admission, it is respectfully submitted that the Petitioners may prove gender discrimination according to the ordinary standards of proof, and do not have to be limited to the *McDonnell-Douglas* paradigm, which was intended to *assist* plaintiffs in proving discrimination in the *absence* of such an admission by the employer. It is respectfully submitted that it is inappropriate to "turn *McDonnell-Douglas* on its head" by limiting the Petitioners to a paradigm searching for reasonable inferences when the admission of gender discrimination is in black and white for everybody to see. It is not necessary to first

"pigeonhole" the Task Force Report as either "direct" or "circumstantial" evidence to acknowledge that it is *relevant* evidence of an admission by the employer of gender discrimination.

Even assuming *arguendo*, that the Petitioners might be limited to the *McDonnell-Douglas* paradigm, the Court of Appeals erred by failing to consider the Task Force Report at the pretext stage of the *McDonnell-Douglas* paradigm with respect to at least two Petitioners whom the District Court found had established *prima facie* cases of gender discrimination under the *McDonnell-Douglas* paradigm, even though it is clear that such pattern and practice evidence is relevant to prove pretext in a non-class, non-EEOC case of individual disparate treatment. *McDonnell Douglas Corp. v. Green*, 411 U.S.792, 804-05 (1973) ("[o]ther evidence that may be relevant to any showing of pretext includes facts as to . . .[the defendant's] general policy and practice with respect to minorities.").

Indeed, the Court of Appeals conceded that the Task Force Report constituted circumstantial evidence of discrimination under *McDonnell-Douglas*. Thus, it was error for the Court of Appeals to require Petitioners to adduce *additional* evidence "to contradict the statements of management and Task Force members regarding the manner in which the report was generated" (p. 2 of Court of Appeals' opinion) precisely because the *face* of the Task Force Report constituted an admission of unlawful gender discrimination, and thus was competent evidence to show . . .[the Respondent's] general policy and practice with respect to [women]."). *McDonnell Douglas Corp. v. Green*, 411 U.S.792, 804-05 (1973).

CONCLUSION

Based on the foregoing reasons, Petitioners respectfully request the issuance of a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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(any footnote trails end of each document)

No. 07-13494

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

SUE CODY, OZZIE BROWN, DELORIS LUNDY, SHAUNA BAUGH, individually and on behalf of all others similarly situated,
Plaintiffs-Appellants,

versus

GOLD KIST, INC.,
Defendant-Appellee

April 25, 2008, Decided

April 25, 2008, Filed

NOTICE: PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Appeal from the United States District Court for the Northern District of Georgia. D. C. Docket No. 03-00745-CV-RWS-1.

JUDGES: Before EDMONDSON, Chief Judge, BLACK and FARRIS, * Circuit Judges.

OPINION

PER CURIAM:

Appellants are four women who worked in the Information Services Department at Gold Kist, Inc. and filed claims of sex discrimination against the company pursuant to Title VII, 42 U.S.C. § 2000e, et seq. Appellants contest the district court's grant of summary judgment against their individual failure-to-promote and disparate pay discrimination claims. The claims were filed after Gold Kist released to employees a Task Force Report, which Appellants contend is an admission of gender discrimination by the company. On appeal, Appellants' primary argument is the district court erred when it determined the Task Force Report was not conclusive proof of discrimination, but instead constituted circumstantial evidence of discrimination which could be used to support Appellants' individual claims under the familiar *McDonnell Douglas* framework. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973).

Reviewing the district court's order *de novo* and viewing all the evidence in the light most favorable to Appellants, we conclude the district court did not err in its treatment of the Task Force Report. Appellants offered no evidence to contradict the statements of management and Task Force members regarding the manner in which the report was generated. The Task Force only reviewed employee complaints, assumed those complaints were true, and did not conduct an independent investigation. Thus, the undisputed record evidence reveals the report was the product of an investigation which consisted of reviewing complaints raised in employee interviews and theorizing potential causes of those complaints. The Task Force's findings were a list of the problems identified by employees, their potential causes, recommended solutions, and a

time table for implementing those [*3] solutions. The report does not rise to the level of an admission of discrimination; rather, it constitutes evidence of employee perceptions of gender related problems. Gold Kist viewed the report as its effort to take employee perceptions seriously and to take steps to improve those perceptions. Viewed in its proper context, the report merely constitutes circumstantial evidence of discrimination and was properly analyzed under the *McDonnell Douglas* framework. *See Wilson v. B/E Aerospace, Inc.*, 376 F.3d 1079, 1086-88 (11th Cir. 2004).

We have carefully reviewed the briefs and the record with respect to each individual claim of discrimination, and with the benefit of oral argument, we have found no reversible error. Thus, we affirm.

AFFIRMED.

Footnote

*Honorable Jerome Farris, United States Circuit Judge for the Ninth Circuit, sitting by designation.

6/29/2007
CIVIL ACTION NO. 1:03-CV-0745-RWS
IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

SUE CODY, OZZIE BROWN, DELORIS LUNDY and SHAUNA BAUGH,
Plaintiffs,
v.
GOLD KIST, INC.,
Defendant.

ORDER

This case comes before the Court for resolution of the following motions: (i) Defendant's Motion for Summary Judgment on the Claims of Plaintiff Debris Lundy [149]; (ii) Defendant's Motion for Summary Judgment on the Claims of Plaintiff Sue Cody [150]; (iii) Defendant's Motion for Summary Judgment on the Claims of Plaintiff Ozzie Brown [151]; (iv) Defendant's Motion for Summary Judgment on the Claims of Plaintiff Shauna Baugh [152]; (v) Defendant's Emergency Motion to Seal Documents [171]; (vi) Defendant's Motion to Strike Portions of Plaintiff Deloris Lundy's Statement of Disputed Material Facts [179]; (vii) Defendant's Motion to Strike Portions of Plaintiff Sue Cody's Statement of Disputed Material Facts [180]; (viii) Defendant's Motion to Strike Portions of Plaintiff Shauna Baugh's Statement of Disputed Material Facts [181]; and (ix) Defendant's Motion to Strike Portions of Plaintiff Ozzie Brown's Statement of Disputed Material Facts [182]. As an initial matter, Defendant's Emergency Motion to Seal Documents

[171] is GRANTED. After reviewing the entire record, the Court enters the following Order.

Background

Plaintiffs initiated this case on March 19, 2003, alleging that they and others similarly situated had endured discrimination on the basis of their sex while employed by Defendant Gold Kist, Inc. ("Gold Kist" or the "Company"). In the sole count of their Amended Complaint, Plaintiffs bring a claim under Title VII of the 1964 Civil Rights Act, as amended, 42 U.S.C. §§ 2000e et sec. ("Title VII"), alleging gender discrimination. (See Pls.' Am. Compl. [3].)

By Order dated June 13, 2005, this Court declined class certification, finding that Plaintiffs had failed to meet the commonality and typicality requirements of FED. R. Civ. P. 23(a). (See Order of Jun. 13, 2005 [99] at 21-28.) The Court concluded that the "pronounced decentralization of the decision-making process" in Gold Kist, "especially when coupled with the Company's geographic dispersion," militated against finding that the Plaintiffs' claims were typical of and common among members of the class. (Id. at 23.) The Court found, moreover, that Plaintiffs, who were all employed in the Company's 50-employee Information Services Department (the "I.S. Department") at the Company's corporate office in Atlanta, Georgia, did not adequately represent the interests of the proposed nationwide class of all salaried, non-management, non-supervisory female employees. (See id. at 2833.)

Plaintiffs now pursue their claims individually. Before turning to resolve the outstanding motions referenced

above, the Court provides a background of the general facts and allegations contained in Plaintiffs' Complaint and summarizes the Task Force Report and the Equal Employment Opportunity Commission ("EEOC" or the "Commission") determination on which Plaintiffs rely. As this case comes before the Court on Defendant's motions for summary judgment, the facts are recounted in a light most favorable to Plaintiffs.

I. The Parties

Gold Kist, which maintains its corporate office in Atlanta, Georgia, is a company engaged in the poultry processing business. Gold Kist's operations are divided into nine divisions at fifty locations that span seven states. Gold Kist employs approximately 16,000 people, one thousand of which are salaried employees.

Plaintiffs in this suit are four salaried women who either work or previously worked in Gold Kist's I. S. Department at the Company's corporate office in Atlanta, Georgia.[1] Of them, only Ms. Baugh remains employed by Gold Kist. Each Plaintiff claims that Gold Kist denied her a job promotion and paid her less than comparable male employees on the basis of her gender.

II. The Task Force Report

Plaintiffs and other female employees met with executives of Gold Kist in the summer of 2000 to voice their concerns about perceived gender bias within the Company. At the close of the meeting, certain executives, including Gold Kist's Senior Vice President of Planning and Administration, Michael Stimpert, decided to create a Task Force to examine the issue.

The record before the Court sheds light on the processes employed and the evidence reviewed by the Task Force during the course of its investigation. Mr. Stimpert appointed a manager from one of Gold Kist's Alabama facilities, Sheila Walters, to interview female employees that worked within Gold Kist's I.S. Department. A record of these interviews was provided to Harry McDonald, the Company's Vice President of Human Resources, who organized the concerns expressed in the interviews, and compiled a "recap" summary of those concerns. This recapitulation was then discussed at a meeting between management and the female I. S. Department employees on October 23, 2000, and supplemented with additional concerns expressed by the employees at that meeting. The record, accompanied by notes of the interviews conducted by Ms. Walters, was then provided to the Task Force. The members of the Task Force were instructed to assume the employee grievances expressed in the provided materials were true. They conducted no further investigation into the accuracy of any concerns or perceptions articulated by the workers.

Following its review of these materials, the Task Force compiled a Report that identified seventeen "Problems" within the Company. Among them were the following: (1) "Qualified female employees not considered for promotions[,]" (2) "Female new hires paid at a lower salary/position than male new hires[,]" (3) "Lack of respect for females[,]" and (4) "Gender bias issue throughout Gold Kist[.]" The Task Force made recommendations on how to address the "Root Causes" of these problems, including "implementing an affirmative action program to promote females." The record reflects that at least some of these

recommendations were implemented on a company-wide scale. Beginning in March 2001, after Gold Kist hired Sandra Kearney to replace its former Vice President of Information Services and to lead the I.S. Department, Ms. Kearney implemented a reorganization of the I. S. Department, which became effective on March 26, 2001. As a result of this reorganization, the four Plaintiffs in this action were promoted to new positions with increased pay.

III. EEOC Complaint

On December 12, 2000, after Gold Kist issued the Task Force Report but before the Company's reorganization, Plaintiffs filed charges with the EEOC of similar substance to those alleged here.[2] On September 30, 2002, the EEOC issued a Determination, which concluded that "it is more likely than not that the Charging Part[ies], as well as the class, w[ere] discriminated against" in violation of Title VII. (See Ex. B, C, D, & E to Am. Compl. [3].) Because Gold Kist did not respond to the charges filed by Plaintiffs, the EEOC concluded that its "silence [was] an admission of the allegations made" and thus Gold Kist had failed to meet its burden of disproving a violation.[3] (Id.)

The individual instances of discrimination each Plaintiff alleges she suffered within the relevant time frame are set forth in more detail below in the Court's discussion of Gold Kist's motions for summary judgment.

Discussion

I. Defendant's Motions for Summary Judgment

A. Summary Judgment Standard

Summary judgment is appropriate only when the pleadings, depositions, and affidavits submitted by the parties show that no genuine issue of material fact exists and that the movant is entitled to judgment as a matter of law. FED. R. Civ. P. 56(c). The court should view the evidence and any inferences that may be drawn from it in the light most favorable to the non-movant. Adickes v. S.H. Kress & Co., 398 U.S. 144, 158-59, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970). The party seeking summary judgment must first identify grounds that show the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323-24, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). The burden then shifts to the non-movant, who must go beyond the pleadings and present affirmative evidence to show that a genuine issue of material fact does exist. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 257, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

B. Applicable Legal Principles

Title VII makes it unlawful to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's. . . sex." 42 U.S.C. § 2000e-2(a)(1). There are two theories of intentional discrimination under Title VII: disparate-treatment discrimination and a pattern or practice of discrimination. See Burke-Fowler v. Orange County, 447 F.3d 1319, 1322 (11th Cir. 2006).

Plaintiffs rely only on circumstantial evidence[4] in support of their claims of disparate treatment, and thus the framework for this Court's analysis is the familiar

one articulated by the Supreme Court in McDonnell Douglas Cord. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). Under the McDonnell Douglas framework, a plaintiff first must show an inference of discriminatory intent, and thus carries the initial burden of establishing a pima facie case of discrimination. Brooks v. County Comm'n of Jefferson County, Ala., 446 F.3d 1160, 1162 (11th Cir. 2006).

Plaintiffs assert, in various parts of their briefs, that this is a pattern-or practice case, arguing that, in view of what they characterize as admissions made by Gold Kist in the Task Force Report, they "may prevail on their individual disparate treatment claims without regard to whether a McDonnell Douglas `prima facie' case is proven." (See Pls.' Resp. to Def.'s Mot. for Summ. J. [162-2] at 43.). However, while Plaintiffs may rely on the Task Force Report in support of their individual claims of discrimination, it is well-established that to recover under Title VII, a plaintiff must prove that she was directly affected by a discriminatory employment decision. As the Eleventh Circuit has explained:

> In an action brought by individual plaintiffs alleging discrimination in various facets of the employment process, e.g. hiring, promotion, and termination, each plaintiff bears the burden of proving that each employment decision that adversely affected him or her was the product of a discriminatory motive. This is not to say, of course, that several plaintiffs may not rely on identical evidence to prove this motive or that a single plaintiff may not present similar evidence to prove discrimination in various employment

> decisions adversely affecting him or her. We mean only to state the obvious fact that each plaintiff bears the burden of proving each of his or her individual causes of action, whether by direct evidence or by circumstantial evidence via the McDonnell Douglas analysis.

Id. at 1143.

Thus, though pattern-or-practice evidence "undoubtedly makes it more likely" that a defendant discriminated against a particular plaintiff, "a determination that a defendant may have engaged in a pattern and practice of discrimination is, standing alone, insufficient to support a claim of ... discrimination in an individual case." Alexander v. Fulton County, 207 F.3d 1303, 1335 (11th Cir. 2000); see also Carmichael v. Birmingham Saw Works, 738 F.2d 1126, 1132 (11th Cir. 1984) ("[A]lthough a case of classwide discrimination might be made out by `compelling independent evidence of a pattern or practice of discrimination,' in an individual case `each plaintiff bears the burden of proving that each employment decision that adversely affected him or her was the product of a discriminatory motive.'") (citing Perryman, 698 F.2d at 1143); Scarlett v. Seaboard Coast Line R. Co., 676 F.2d 1043, 1053 (5th Cir. Unit B May 24, 1982) (holding that individual claim under Title VII could not be labeled "pattern and practice" claim because "[a]n individual proceeding as an individual under Title VII must prove the elements of a discriminatory hiring claim as set forth in McDonnell Douglas"). That is so because "[u]mess the individual plaintiff can point to some specific instance of discrimination, there is no wrong for the court to remedy." Carmichael, 738 F.2d at 1132.

Plaintiffs claim disparate treatment in both pay and promotional decisions, and thus the Court examines the requirements for each claim in turn under the McDonnell Douglas framework.

l. Standards for a Failure-To-Promote Claim

To establish a prima facie case of a violation of Title VII for failure to promote based on circumstantial evidence, a plaintiff must show that: (1) she is a member of a protected class; (2) she was qualified and applied for the promotion; (3) she was rejected despite her qualifications; and (4) another equally or less qualified employee who was not a member of the protected class was promoted. Wilson v. B/E Aerospace, Inc., 376 F.3d 1079, 1089 (11th Cir. 2004) (citing Lee v. GTE Florida, Inc., 226 F.3d 1249, 1253 (11th Cir. 2000)). "The relevant inquiry ... is not to judge which employee was more qualified, but to determine whether any disparity between ... qualifications is so great that a reasonable fact-finder could infer that [the defendant] did not believe [the promoted employee] to be better qualified." Cofield v. Goldkist, Inc., 267 F.3d 1264, 1268 (11th Cir. 2001). "Our precedent ... requires a strong showing of a disparity in qualifications in order for an inference of discrimination to arise." Denney v. City of Albany, 247 F.3d 1172, 1187 (11th Cir. 2001).

Once a prima facie case is established, the defendant must produce a legitimate, non-discriminatory reason for its decision not to promote the plaintiff. The burden then shifts to the plaintiff to prove by a preponderance of the evidence that the defendant's proffered reason is pretext for gender discrimination. Courts will not, however, "second guess" an employer's decision "to

emphasize qualifications over length of service" in failure-to-promote cases. Id. at 1269.

2. Standards for a Disparate-Pay Claim

The requirements of a Title VII disparate-pay claim rest on a similar burden-shifting framework. See Miranda v. B & B Cash Grocery Store, Inc., 975 F.2d 1518, 1528 (11th Cir. 1992) (adopting McDonnell Douglas burden -shifting framework for disparate-pay claims). To establish a pima facie case of disparate pay, a female Title VII plaintiff must show that she occupies a job similar to that of higher paid males. "The comparators must perform jobs similar to the plaintiff's; thus, the plaintiff must show that, in her job, she `shared the same type of tasks' as the comparators." Cooker v. Southern Co., 390 F.3d 695, 735 (11th Cir. 2004) (citing B&B Cash Grocery, 975 F.2d at 1529). Once a prima facie case is established, the defendant must meet its "exceedingly light" burden of articulating a legitimate, non-discriminatory reason for the pay disparity. Ledbetter v. Goodyear Tire & Rubber, Co., 421 F.3d 1169, 1185 (11th Cir. 2005), cert. granted, 126 S. Ct. 1965, 165 L. Ed. 2d 949 (2006) (quoting Meeks v. Computer Assocs. Int'l, 15 F.3d 1013, 1019 (11th Cir. 1994)). After such a reason is proffered, the burden shifts back to the plaintiff to demonstrate by a preponderance of the evidence that the employer had a discriminatory intent, i.e., that "a discriminatory reason more likely than not motivated the employer to pay her less." Id. The Eleventh Circuit has recently explained the plaintiff's burden to show pretext in a disparate pay case, stating:

> The question becomes whether the plaintiff has

> demonstrated such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could find them unworthy of credence. The risk of nonpersuasion always remains with the plaintiff. If the evidence is in equipoise on the issue of whether a salary differential is based on a factor other than sex, the employer prevails.

Id. at 1186 (citations and quotations omitted).

With these standards as a foundation, the Court turns to examine whether Gold Kist is entitled to summary judgment on any of Plaintiffs' individual Title VII claims.

C. Individual Plaintiffs' Claims

1. Deloris Lundy

Plaintiff Debris Lundy claims that she was denied a promotion to the position of Micro Maintenance Specialist on the basis of gender. She also claims that, once she was eventually promoted to the position of Micro Maintenance Specialist in March 2001, she was paid $5,000 less than a comparable male because of her sex.

Ms. Lundy began working for Gold Kist in July 1987, and remained there until August 7, 2001. Ms. Lundy's starting salary in 1987 was $13,800, which was below the stated minimum for the position. (PSMF (Lundy) Par. 5.) Over the following nine years, Ms. Lundy received eleven pay increases, taking her salary to $26,500 as a Control Technician/Computer Assistance

Operator in 1996. That year, she resigned her employment due to work stress. Ms. Lundy testified that, prior to 1996, "she never expressed interest in any position that she felt she was denied because of her sex" and otherwise was not subjected to sex discrimination. (DSMF (Lundy) Par. [149-3] Par. 13; PSMF (Lundy) Par. 13.)

After a brief period of performing contract work for Gold Kist between December 1996 and December 1997, Ms. Lundy reapplied to Gold Kist for a permanent position. Gold Kist rehired Ms. Lundy to the position of Administrative Specialist IV in the I. S. Department. Ms. Lundy was assigned similar duties as she had prior to her resignation in 1996, with the added responsibility of performing "back up for the computer room," offering her exposure to the Company computer system. (PSMF (Lundy) Par. 18.1.)

In 1998 and 1999, Gold Kist conducted two performance reviews of Ms. Lundy. The 1998 Performance Review stated that Ms. Lundy "met expectations" and "has demonstrated superior communications and people skills," and that she "demonstrated a willingness to learn new skills and is actively working toward the Certified Help Desk Professional designation." (PSMF (Lundy) Par. 24.1.) The 1999 Performance Review was similarly praising, stating that Ms. Lundy "exceeded expectations" and was the only member of the Operations staff to achieve an assigned `99 Performance Goal of certification," having achieved certification as a Help Desk Professional. (Id. Par. 27.1.) Ms. Lundy states that she does not believe that Gold Kist discriminated against her on the basis of gender in generating the performance reviews. (Id. Pars. 21, 25,

27.)

Despite her good performance, in September of 1999 and in March of 2000, Gold Kist hired two new male employees, Michael Saul and Randall Williams, to the position of Micro Maintenance Specialist, for which Ms. Lundy had applied or was seeking consideration. On April 26, 2000, Ms. Lundy filed a formal charge with the EEOC alleging that Gold Kist had hired these employees at a higher salary and at a higher job-level, despite the fact that Ms. Lundy had herself trained these two employees and had similar job responsibilities. However, the EEOC dismissed the charge, concluding that Gold Kist had provided legitimate, non-discriminatory reasons for its actions. The EEOC issued Ms. Lundy a Dismissal and Notice of Rights on August 9, 2000.

Around the same time Ms. Lundy filed her first EEOC Complaint, in April of 2000, Ms. Lundy took four months of disability leave. Before taking leave, she had occupied the position of a Computer Assistance Operator/Control Technician. In July of 2000, upon returning from disability leave, Ms. Lundy was told that the position had been eliminated, and that she would need to qualify for the position of Micro Maintenance Specialist. Until she did so, Gold Kist rehired her as a "Help Desk Analyst." According to Plaintiffs, however, she was already qualified for the position of Micro Maintenance Specialist, and the position was "available." Nevertheless, she did not receive a promotion into the position of Micro Maintenance Specialist until March 2001, at the time of Gold Kist's reorganization. According to Plaintiffs, "[t]he fact that Ms. Lundy was promoted into the

[position] in March 2001 establishes that she had been qualified for that promotion from July 2000 forward." (Pls.' Reply in Supp. of Mot. for Class Certification [92] at 8.) After being promoted to Micro Maintenance Specialist, Ms. Lundy was paid $5,000 less than Mr. Williams, who occupied the same position.

Along with the other three Plaintiffs in this action, Ms. Lundy filed her second complaint to the EEOC on December 12, 2000, alleging that the two employees hired by Gold Kist in September 1999 and March 2000 were being paid more than Ms. Lundy for similar work. As did the other Plaintiffs, Ms. Lundy also made general allegations of sex discrimination based on the issuance of the Task Force Report in October of 2000.

Having reviewed the facts surrounding Ms. Lundy's claims in this action, the Court turns to determine whether Defendants are entitled to summary judgment.

a. Ms. Lundy's Failure-to-Promote Claim

Defendants argue that Ms. Lundy's failure-to-promote claim, which asserts that Gold Kist failed to promote her to the position of Micro Maintenance Specialist prior to March 2001, is time-barred. The Court agrees.

Title VII requires that a claimant file a charge of discrimination within 180 days of the alleged unlawful employment action, and the failure to do so precludes suit. 42 U.S.C. § 2000e-5(e)(1). As this Court has previously concluded, the claims in this lawsuit are based upon Ms. Lundy's December EEOC complaint, and thus must have arisen on or after June 15, 2000, to

be timely.[5] (See Order of June 13, 2005 at 5 n.5.) Ms. Lundy alleges that, in September of 1999 and in March of 2000, Gold Kist selected two male employees over her for the position of Micro Maintenance Specialist on the basis of her gender. Both denials of a promotion occurred prior to June 15, 2000, and thus are time-barred.

Notwithstanding the obvious time bar of Ms. Lundy's failure-to-promote claim as it relates to the hiring of Mr. Saul and Mr. Williams, Ms. Lundy argues that her failure-to-promote claim may be revived because the position of Micro Maintenance Specialist remained available to her during the summer and autumn of 2000. To this end, she states that, at Gold Kist, "promotions were not limited to vacancies, but were available at all times, based on performance."

(Pls.' Resp. [162-3] at 69.) Thus, Plaintiff concludes, the failure to promote Ms. Lundy constituted a "continuing violation" that encroached into the relevant time period after June 15, 2000.

As Defendants correctly point out, however, an unlawful decision not to promote is a "discrete act[] of discrimination" that occurs on the day that it happens, see Nat'l R.R. Passenger v. Morgan, 536 U.S. 101, 114, 110, 122 S. Ct. 2061, 153 L. Ed. 2d 106 (2002), and therefore the continuing violation doctrine does not apply to failure-to-promote claims. Price v. M & H Valve Co., 177 F. App'x 1, 10 (11th Cir. 2006) (holding that failure-to-promote claim is not subject to continuing violation doctrine); Stuart v. Jefferson County Dept. of Human Resources, 152 F. App'x 798, 800-01 (11th Cir. 2005) (same); cf. Beavers v. American

Cast Iron Pike Co., 975 F.2d 792, 796 (11th Cir. 1992) (rejecting continuing violation analysis in context of discrete act). To survive dismissal, Ms. Lundy must therefore allege a discrete promotional decision within the relevant time period to sustain a claim under Title VII. Id.

Here, though Ms. Lundy offers that a promotional decision could have been made at any time in the later months of 2000, Ms. Lundy has neither identified a specific decision within the relevant time period not to promote her, nor identified any other male applicant who was offered a vacant position within the relevant time period. That failure is fatal to Ms. Lundy's prima facie case of failure to promote. Price, 177 F. App'x at 10; Stuart, 152 F. App'x at 800-01; cf. also Underwood v. Perry County Comm'n, 431 F.3d 788, 793-94 (11th Cir. 2005); E.E.O.C. v. Joe's Stone Crabs, Inc., 296 F.3d 1265, 1272 (11th Cir. 2002) (holding that failure-to-hire claim was "discrete, one-time employment event[] that should have put the claimants on notice that a cause of action had accrued" and thus was not subject to continuing violation doctrine). Moreover, besides conclusively arguing that her promotion in March of 2001 established her qualifications for the position in prior months, Ms. Lundy has failed to introduce evidence establishing that she was qualified to perform the duties required by the Micro Management Specialist position prior to March of 2001.

For these reasons, the Court concludes that (1) insofar as Ms. Lundy seeks to recover for Defendants' failure to promote her prior to June 15, 2000, her claims are time-barred; and (2) insofar as Ms. Lundy seeks to recover for a failure to promote after June 15, 2000,

Plaintiff has failed to demonstrate a pima facie case of gender discrimination. Accordingly, Defendant's motion for summary judgment on Ms. Lundy's failure-to-promote claim is GRANTED.

b. Ms. Lundy's Disparate-Pay Claim

In her second allegation, Ms. Lundy contends that, after she was promoted as a result of the reorganization to the position of Micro Management Specialist in March 2001 and given a 14% pay raise, she was still paid $5,000 less than Mr. Williams, who occupied the same position, on the basis of gender discrimination. Defendants concede that Plaintiff has established a prima facie case of a pay disparity under the McDonnell Douglas framework, but respond by proffering that the pay difference between Ms. Lundy and Mr. Williams was to account for the differences in their qualifications, abilities, and experience.

Sandra Kearney, Gold Kist's Vice President of Information Services, was charged with reclassifying employees in the I. S. Department after the Task Force Report was issued. According to Ms. Kearney, she decided to classify Ms. Lundy to the Micro Management Specialist position "because there was nowhere else to place her." (Defs.' Br. in Supp. of Mot. for Summ. J. [149-2] at 20.) Before the reclassification, Ms. Lundy "was performing a role that involved mainly answering calls, rather than truly resolving them," because she "did not have the knowledge to personally resolve more complex [Problem Assistance Requests]." (Id.) Mr. Williams, on the other hand, "was fully qualified" and had already been performing the responsibilities of the position since he was originally hired as a Micro

Management Specialist in March of 2000. Because, Defendant contends, Ms. Kearney "honestly believed," based on both individuals' prior performance that Mr. Williams brought greater competency and experience to the job of Micro Management Specialist, she set their salaries at different levels. (Id.)

In response, Ms. Lundy argues that the wide disparity between her and Mr. Williams' pay combined with the findings of the Task Force are sufficient to create a factual dispute as to whether Ms. Kearney's proffered reasons for paying her less money are a pretext for sexual discrimination. She also claims that her pay was $1,750 less than Eugene Washington, who had the inferior job title of Computer Operator, indicating further that Ms. Kearney's proffered reasons are a pretext for sex discrimination.

As an initial matter, the Court recalls its prior conclusion that Plaintiffs' reliance on the subjective and conclusory statements in the Task Force Report do not fully alleviate Plaintiff's burden to show pretext for the reasons for the discrete act of electing to pay Plaintiff less than her male counterparts. Rather than reflecting objectively verifiable findings based upon statistical analysis, the Task Force Report reiterated the subjective perceptions of a handful of employees, and "appears to be little more than a well-organized compilation of anecdotes and impressions from the women working in a single department of an expansive, geographically diverse enterprise." (Order of Jun. 13, 2005 at 27.) More importantly, the Task Force Report was compiled prior to the reorganization of April 2001, which is the discrete act forming the basis of Ms. Lundy's disparate pay claim. While it may provide

some historical context surrounding Gold Kist's decision to reorganize and raise the specter of gender discrimination by individuals who made employment decisions during the time period the Report covered, in the Court's view, the Task Force Report does not demonstrate that Ms. Kearney's reasons for paying Ms. Lundy $5,000 less than her male counterpart-namely, her understanding of the employees' respective performance, experience and competence-are a pretext for gender discrimination. Indeed, is not disputed that Ms. Kearney made the decision to promote Ms. Lundy and increase her pay as a part of a company-wide effort to execute the recommendations of the Task Force and alleviate perceived gender discrimination within the I. S. Department at Gold Kist.

Furthermore, Ms. Lundy's reliance on the fact that Eugene Washington, as a Computer Operator, was paid $1,750 more than Ms. Lundy does not, by itself, evidence that Ms. Kearney's pay decision was a pretext for sex discrimination. Alleged comparators "must perform jobs similar to the plaintiff's; thus, the plaintiff must show that, in her job, she `shared the same type of tasks' as the comparators." Cooker v. Southern Co., 390 F.3d 695, 735 (11th Cir. 2004) (citing B&B Cash Grocery, 975 F.2d at 1529). Here, besides noting Mr. Washington's job title, Ms. Lundy has not provided sufficient evidence establishing that Mr. Washington and Ms. Lundy shared the same type of tasks. The Court therefore has no basis to determine whether Mr. Washington is a valid comparator to Plaintiff.

In sum, the Task Force Report combined with the mere fact of disparity in pay among Ms. Lundy and Mr. Williams and other males with ostensibly inferior job

titles does not alone "demonstrate[] such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could find them unworthy of credence." Ledbetter, 421 F.3d at 1185. Because Ms. Lundy proffers no evidence to call into question Ms. Kearney's testimony that she set pay rates based upon her good faith perception of Ms. Lundy's relative abilities and experience-other than Ms. Lundy's own conclusory statements that she was as qualified as her counterparts-no reasonable fact finder could conclude based on the evidence in the record that Ms. Kearney's decision to pay Ms. Lundy less than several other males in her department was motivated by gender discrimination. Accordingly, insofar as Defendants move for summary judgment on Ms. Lundy's disparate-pay claim, that motion is GRANTED.[6]

2. Sue Cody

Plaintiff Sue Cody began working for Gold Kist in 1979, and remained employed there until her resignation in December 2003. She cites two events within the relevant time period in which she was purportedly denied promotions based on her sex in violation of Title VII, and two instances of pay disparities for which she seeks relief under Title VII.[7]

a. Ms. Cody's Failure-to-Promote Claim: Butch Mitchell

In her first allegation, Ms. Cody states that in July 2000, both she and Butch Mitchell occupied the position of Programmer Analyst II. She contends that at this

time, she had greater responsibilities than Mr. Mitchell, but that Mr. Mitchell was nevertheless promoted to Senior Analyst, while she was not. Ms. Cody also states that Gold Kist had not posted an opening for a Senior Analyst/Programmer position when Mr. Mitchell received the promotion.

Acknowledging that Ms. Cody has made a prima facie case, Defendants proffer that Mr. Mitchell was selected for the position for performance reasons. Mr. Pressley Boyd, Ms. Cody's supervisor, testified that he made the recommendation and final decision to promote Mr. Mitchell over Ms. Cody.

Mr. Boyd states that he recommended Mr. Mitchell for promotion because of "his successful execution of the M-Tech Feed Scheduling system," a project in which he was involved in the year prior to his promotion. (Boyd Aff Par. 20.) During this time, he achieved a "'billable percentage' of 110 percent" and "needed very little management intervention." (Id. Pars. 20; 23.) During a similar period, Ms. Cody had a billable percentage of 79%. Mr. Boyd also testified that Mr. Mitchell had specialized understanding of the feed mill and its processes and "how those issues can and do effect [sic] [Gold Kist's] computer systems." (Id. Par. 23.)

Although Mr. Boyd acknowledged that Ms. Cody's work as a Programmer Analyst II was satisfactory, he also testified that he had concerns about her performance that caused him not to recommend her for the promotion to Senior Analyst. First, Mr. Boyd stated that Ms. Cody "did not accept a leadership role when given the opportunity to become the Business Planning and Control Systems ["BPCS"] team lead." (Boyd Dep.

at 45-46.)

Second, Mr. Boyd testified that Ms. Cody had experienced managerial difficulties in working on the BPCS team. Trina Baynes, another female I.S. Department employee, complained that Ms. Cody exhibited "an overly abrasive attitude." (Boyd Aff. Par. 25.) Although Ms. Cody denied these allegations during a meeting to resolve the issues between Ms. Cody and Ms. Baynes, Mr. Boyd concluded, based on that complaint and several others, that Ms. Cody was "tough to deal with" and "tough to communicate with." (Boyd Dep. at 63-70.)

Finally, Gold Kist received several complaints from customers concerning Ms. Cody's performance as a telephone operator. Based on these complaints, Mr. Boyd concluded that Ms. Cody had encountered some difficulty communicating with customers and providing telephone support. (See Boyd Dep. at 50-70.) Mr. Boyd states that, based on these observations, he concluded that Ms. Cody was not deserving of a promotion to Senior Analyst, whereas Mr. Mitchell was entitled to a promotion.

In response, Ms. Cody disputes that she did not take a leadership opportunity on the BPCS team. Although she acknowledges that a complaint by Trina Baynes was made, she states that it was resolved without any investigation. According to her testimony, Mr. Boyd agreed to give each employee "a clean slate" and that their "previous altercations [should] be put in the past." (See Ex. 10 to Boyd Dep.)

Plaintiffs also argue that Mr. Boyd's testimony about

Ms. Cody's prior performance does not comport with an evaluation of Ms. Cody for the period ending May 1998, in which she was rated as "Exceeding Expectations" overall and ranked as "Met Expectations" in the "Employee Relations" category. (See Ex. 30 to Boyd Dep.) Plaintiffs also challenge the specificity of Mr. Boyd's memory regarding complaints he received about Ms. Cody. Turning to the performance comparison of Ms. Cody and Mr. Mitchell, Plaintiffs contend that Ms. Cody's 79% billing percentage actually demonstrates that Ms. Cody was a more productive employee because she was able to complete all of her assigned tasks in less time than Mr. Mitchell. While Mr. Mitchell worked overtime, Ms. Cody contends that she completed the same amount of work in 31.6 hours (79% of a work week) as Mr. Mitchell could complete in 44 hours (110% of a work week).

Plaintiffs argue that an email sent by Mr. Boyd to Ms. Cody shortly after Mr. Mitchell was promoted to the Senior Analyst position reveals the inconsistency of his testimony regarding the reasons for her non-selection. After Ms. Cody made a direct inquiry to Mr. Boyd about his decision to promote Mr. Mitchell instead over her, he responded as follows:

> I can only review the years that you have been reporting to me. You do have good analytical skills, but I expect that from a Programmer/ Analyst II. I expect someone at your level to communicate and work with others well. But in going above and beyond and really pushing yourself you don't. Examine yourself. When do you arrive. When do you leave. How many weekends have you given up. How many issues

> do we have everytime someone else is promoted. Instead of worrying about that, you should be accepting more important roles or taking on leadership responsibilities. Sue you are definitely an asset to the BPCS support team, but for someone to achieve the level you want I would expect that person to be the leader of this kind of team. And the leader doesn't have to be an appointed position. It should just be one that the other members and users had just "self-appointed" on their own.

(Ex. 7 to Boyd Dep.) (emphasis added).[8]

Notably, however, Plaintiffs do not challenge the qualifications of Mr. Mitchell as compared to Ms. Cody in their papers. To show that Defendants' proffered reasons for selecting Mr. Mitchell over Ms. Cody were pretextual, Plaintiff must make "a strong showing of a disparity in qualifications in order for an inference of discrimination to arise." Denney, 247 F.3d at 1187 (11th Cir. 2001). The Court "must not judge which employee was more qualified, but determine whether any disparity is so great that a reasonable fact-finder could infer that [the employer] did not believe" that the comparator was better qualified. Wilson, 376 F.3d at 1090.

Here, the proffered reasons for Gold Kist's decision not to promote Ms. Cody-namely, Mr. Mitchell's superior performance and leadership on company projects and Ms. Cody's problems with respect to employee relations and customer communication-are legitimate reasons for selecting Mr. Mitchell over Ms. Cody for the position of Senior Programmer/Analyst. Although Ms. Cody's

evidence indicates, at best, that Gold Kist, and her direct supervisor, Mr. Boyd, were satisfied with Ms. Cody's work, it does not strongly show that Ms. Cody's qualifications were superior to Mr. Mitchell's. Because a reasonable trier of fact could not conclude based on the evidence that the reasons proffered by Defendant were a pretext for discrimination, the Court concludes that summary judgment in favor of Defendants is warranted on this aspect of her claims. Accordingly, Defendants' Motion for Summary Judgment on this aspect of Ms. Cody's claim is GRANTED.

b. Ms. Cody's Failure to Promote Claim: Joey Holt

Second, Ms. Cody alleges that in August 2000, Gold Kist posted an opening for the position of Programmer Analyst I-a job classification that was inferior to Ms. Cody's job. Given that accepting the position would have resulted in a demotion, Ms. Cody declined to apply for it. She later learned, however, that the position was subsequently reclassified as one for Senior Programmer (although the reclassification was never posted), and that Mr. Boyd selected Joey Holt for the job in September 2000. Mr. Boyd met with Ms. Cody to inform her of his reasons for selecting Mr. Holt over Ms. Cody. When she asked why she had not received the position, she was told by Mr. Boyd that the position involved traveling and he "knew that [Ms. Cody] wouldn't want it." (Cody Decl. Par. 5.)

Defendant contends that the job awarded to Joey Holt required leadership experience and specialized knowledge in Gold Kist's poultry plants, and specifically its bar-coding system, since the I.S. Department employee who was previously in charge of "bar coding

technical issues" left Gold Kist prior to September 2000. (Boyd Dep. at 148-49.) Mr. Boyd had worked with Mr. Holt for several years and observed that he "personally implemented a complete [bar-coding] system in [Gold Kist's Russelville plant] on his own initiative" and had "excellent poultry knowledge" from working in a poultry plant for thirteen years. (Boyd Aff. Pars. 28-29.) Prior to hiring Mr. Holt, however, Mr. Thrailkill, Vice President of Information Services, instructed that Mr. Boyd complete a full evaluation of other employees who might qualify for the Senior Programmer position. Mr. Boyd completed five written assessments of two female employees, including Ms. Cody, and three male employees. In Ms. Cody's assessment, Mr. Boyd noted that she had "limited bar code experience and no poultry or plant operations knowledge." (Boyd Aff. Par. 31.) He noted a similar lack of knowledge and experience in the other four employees considered for the position. After concluding that Mr. Holt had the most technical experience required for the position, Gold Kist awarded Mr. Holt the job.

In response, Plaintiffs contend that Mr. Holt had little to no programming experience before being awarded the Senior Programmer position, and that Mr. Boyd admittedly did not factor in programming experience in his considerations for who was most fit for the promotion. Although Plaintiffs do not contest that Mr. Holt had substantially more experience in Gold Kist's bar-coding system and its poultry processing plants, Plaintiffs argue that the position offered to Mr. Holt also required programming experience, in which Ms. Cody excelled. "A court's resolution of a plaintiff's claim that the work she performed is `equal' to that of the comparator does not depend simply on a comparison of

job titles or classifications, but on a comparative analysis of actual job requirements and performance." Prewett v. State of Alabama Dept. of Veterans Affairs, 419 F. Supp. 2d 1338, 1355 (M.D. Ala. 2006); cf. Pearce v. Wichita County, City of Wichita Falls, Tex., Hosp. Bd., 590 F.2d 128, 133 (5th Cir. 1979) (stating, in case brought under Equal Pay Act, that, "[a]lthough job titles are entitled to some weight in the assessment of comparative responsibility, the controlling factor ... is job content the actual duties that the respective employees are called upon to perform") (citations and quotations omitted). Here, Plaintiffs do not dispute that the position offered to Mr. Holt required specialized knowledge in bar-coding systems and poultry processing. The evidence proffered by Defendants demonstrates that, although the job title was designated "Senior Programmer," the actual duties required by the position required qualifications not possessed by Ms. Cody. Thus, Plaintiff has failed to demonstrate that she was qualified for the position, a necessary element of her prima facie case.

Furthermore, even assuming Plaintiff has established a prima facie case, Plaintiff's evidence does not refute the legitimate, non-discriminatory reason proffered by Defendants that Mr. Holt's prior experience in poultry processing and bar-coding rendered him more suitable for the promotion than the other five candidates considered, including Ms. Cody. See Price, 177 F. App'x at 13 (holding that comparator who was hired "based on his extensive knowledge of CNC machines," among other things, was legitimate, non-discriminatory reason for his promotion over that of African-American plaintiff, and his failure to demonstrate that "he ever operated, much less set up, a CNC machine prior to [the

comparator's] promotion" was fatal to his claim).

Plaintiffs argue that Defendants' failure to post the availability of the Senior Programming position evidences that the reasons proffered are a pretext for sex discrimination. Although Title VII "requires employers to post adequate notice of vacant positions that are available for lateral transfer to better paying jobs, and to promulgate objective standards for an employer to determine his or her eligibility and ranking in order to provide an employee with access to facts that may demonstrate a discriminatory animus," see Joseph's v. Publix Super Markets, Inc., 151 Fed. App'x 760, 767-68 (11th Cir. 2005), when an employer uses informal methods, it may meet its obligation under Title VII by "consider[ing] all those who might reasonably be interested, as well as those who have learned of the job opening and expressed an interest." Carmichael v. Birmingham Saw Works, 738 F.2d 1126, 1132 (11th Cir. 1984) (Wisdom, J.). Here, the evidence irrefutably establishes that Gold Kist considered Ms. Cody for the position awarded to Mr. Holt, and provided written analyses of the merits of her candidacy as compared to other employees within Gold Kist. Whereas in some cases the absence of a job posting may demonstrate that an employer engaged in secretive hiring processes to conceal a discriminatory motive, the evidence in this case demonstrates that Gold Kist made its promotional decision based on the merits, and not on the basis of gender. Accordingly, insofar as Defendant moves for summary judgment on this aspect of Ms. Cody's claims, that motion is GRANTED.

c. Ms. Cody's Pay Disparity Claim: June 2000-March 2001

In addition, Ms. Cody claims that she suffered discrimination in her compensation. Specifically, Ms. Cody states that, between June 15, 2000 to March 25, 2001, she was paid less than her male counterparts. Plaintiff's sole argument in support of her claim is that "the reorganization of the I. S. Department in March 2001 ... reflects that [Ms. Cody] had been underpaid" between June 15, 2000 and March 25, 2001. (See Pls.' Resp. to Defs.' Mot. for Summ. J. [162-3] at 65.)

In Ledbetter v. Goodyear Tire & Rubber Co., Inc., 127 S. Ct. 2162, 2165 (2007), the Supreme Court held that, to succeed in a Title VII claim for pay disparity, a plaintiff must bring forth evidence of a "pay-setting decision ... that occurs at a particular point in time." Id. Ms. Cody has not alleged, much less brought forth evidence, that any decision to set Ms. Cody's pay occurred between June 15, 2000 and March 25, 2001. Rather, the undisputed evidence reflects that Ms. Cody's salary of $56,000 was set on August 1, 1999, and remained at that level until the reorganization of the I. S. Department on March 25, 2001. Because Ms. Cody does not come forth with any evidence of the occurrence of a pay decision between June of 2000 and March of 2001, her pay-disparity claim with respect to that time period is barred by the 180-day statute of limitations. Accordingly, insofar as Defendant moves for summary judgment on this aspect of Ms. Cody's claims, that motion is GRANTED.

d. Ms. Cody's Pay Disparity Claim: March 25, 2001

On March 25, 2001, as a result of the reorganization, Ms. Cody was promoted to Business Applications Architect

and paid a salary of $65,000. Ms. Cody alleges that, as a result of this pay decision, she was paid $2,000 less per year than her male counterparts with the same job title, notwithstanding her greater seniority vis-a-vis those men.

Defendant apparently concedes that Ms. Cody has established a prima facie case of pay discrimination, arguing that similar reasons underlying its decision not to promote Ms. Cody to Senior Programmer in 2000 were considered by Ms. Kearney in setting Ms. Cody's pay. Ms. Kearney testified, for example, that, after discussing all of the Business Applications Managers with the supervisors in the I. S. Department, Ms. Cody "was at the bottom of the ranking." (Kearney Dep. at 83.) Ms. Kearney arrived at this conclusion because of her understanding that "Ms. Cody sometimes [had] inabilities or difficulties in getting along with customers" and "at time [did not take] responsibility that was requested of her." (Id.) Moreover, Defendant points out that, in addition to paying four male employees a $67,000 salary, Ms. Kearney also set the salary of another female Business Applications Manager, Andrea Schlitt, at a rate of $67,000, indicating that gender discrimination did not motivate Ms. Kearney's decision to set Ms. Cody's salary at $2,000 less than her counterparts in the same job title.

Besides arguing that Andrea Schlitt's salary does "not insulate GoldKist from the gender-based discrimination resulting from paying Ms. Cody less than all of the males in that same job title," Ms. Cody offers no evidence to refute the reasons proffered by Defendant for setting her salary at $65,000. In view of the Court's conclusions above, and the lack of evidence establishing

that Ms. Kearney's decision to set Ms. Cody's salary at $2,000 less than her counterparts in a similar job title was a pretext for gender discrimination, the Court concludes that Defendant is entitled to summary judgment. Accordingly, insofar as Defendant moves for summary judgment on that aspect of Ms. Cody's claims, that motion is GRANTED.[9]

3. Ozzie Brown

Plaintiff Ozzie Brown was employed by Gold Kist from June 1997 to September 2003. At all times relevant to this action, Ms. Brown occupied the position of Telecommunications Coordinator.

a. Ms. Brown's Failure-to-Promote Claim

Ms. Brown testified that she was repeatedly assured by the Vice President of Information Services, Mr. Mike Thrailkill, that she would be promoted to the position of Director of Corporate Strategic Planning for Defendant's telecommunications systems. One such assurance, according to Ms. Brown, took the form of a promise that she would receive the promotion following her completion of a project in May of 2000 involving the transition of the Company's Data Frame Relay Network from AT&T to BellSouth. That project was completed in May of 2000, and Plaintiffs assert that it is "logical" to assume that the promised promotion should have occurred around June 15, 2000, or later, inside of the relevant limitations period. (Pls.' Reply in Supp. of Mot. for Class Certification [92] at 11.) Ms. Brown, however, did not receive the promised promotion. According to Ms. Brown, the reasons Mr. Thraikill gave for not providing her the position were, "we can't move

you up until you train a backup," notwithstanding the fact that no backup was provided to her, and "I'm working on getting the paperwork pushed through," and "Gold Kist does not have the money for promotions and raises right now." (See Am. Compl. [3] Par. 68.)

Defendant responds that any claim for failing to promote Ms. Brown to the position of Director of Corporate Strategic Planning is barred by the statute of limitations because any decision not to promote occurred immediately after her completion of the Data Frame Relay Network project occurred at its completion in May of 2000, and thus prior to the relevant limitations period beginning June 15, 2000. Defendant contends that Ms. Brown has not pointed to any "discrete act" of denying her a promotion in the period between June 15, 2000, and the filing of her EEOC claim. Rather, Defendant contends that no decision to not promote Ms. Brown was made during that period, and thus Ms. Brown has not established a prima facie case. Finally, Defendant argues that Ms. Brown has failed to establish a prima facie case of gender discrimination because she was not qualified for the Director of Corporate Strategic Planning position and no similarly situated male was promoted to the position. In any event, Defendant argues that, even assuming Ms. Brown has established a prima facie case of gender discrimination, it declined to promote Ms. Brown for the legitimate, non-discriminatory reason that she was not qualified for a director position.

For largely the same reasons as provided above in the discussion of Ms. Lundy's failure-to-promote claim, the Court agrees with Defendant that Ms. Lundy's claim fails as time-barred and for lack of establishing a prima

facie case of denial of a promotion. As the Court has previously outlined, an unlawful decision not to promote is a "discrete act[] of discrimination" that occurs on the day that it happens, Nat'l R.R. Passenger Corp., 536 U.S. at 114, and therefore the continuing violation doctrine does not apply to failure-to-promote claims. Price, 177 F. App'x at 10; Stuart, 152 F. App'x at 800-01. To survive dismissal, Ms. Brown must therefore allege and come forth with evidence of a discrete promotional decision made during the relevant time period. Id.

Here, Ms. Brown makes a similar argument as Ms. Lundy: Gold Kist could have considered Ms. Brown for a promotion in the later months of 2000, and did not do so. But because Ms. Brown has neither identified a specific decision within the relevant time period not to promote her, nor identified any other male applicant who was offered a vacant position within the relevant time period, Ms. Brown has not met established a prima facie case of failure to promote in violation of Title VII. Price, 177 F. App'x at 10; Stuart, 152 F. App'x at 800-01; cf. also Underwood v. Perry County Comm'n, 431 F.3d 788, 793-94 (11th Cir. 2005); Joe's Stone Crabs, Inc., 296 F.3d at 1272 (holding that failure-to-hire claim was "discrete, one-time employment event[] that should have put the claimants on notice that a cause of action had accrued" and thus was not subject to continuing violation doctrine).

Moreover, Ms. Brown has failed to offer the requisite evidence that Ms. Brown was qualified to perform the duties required by the Director of Corporate Strategic Planning. The evidence is undisputed that, in her position as Telecommunications Coordinator, Ms.

Brown's day-to-day responsibilities included daily maintenance of the telephone system, payment of Telecom bills, and dealing with vendors. It is also undisputed that Ms. Brown did not have managerial or director experience. (Brown Dep. I at 56; Brown Dep. II at 2731.) Ms. Brown's supervisor, Mr. Thrailkill, testified that, based on these observations, he did not consider Ms. Brown well-suited for a managerial or directorial position. (Thrailkill Decl. Pars. 21-22.)

In response, Ms. Brown argues that "even though there was no clear job title into which Ms. Brown could be promoted ... it [is] not necessary for Ms. Brown to prove that she was qualified for the specific position of Director of Corporate Strategic Planning in order to sustain her cause of action for failure to promote." (See Pls.' Resp. to Defs.' Mot. for Summ. J. [162-3] at 68.) The Court disagrees. To establish a prima facie case, Ms. Brown, in addition to showing she is a member of a protected class, must show that "she applied for and was qualified for an available position, that she was rejected, and that after she was rejected [the employer] either continued to seek applicants for the position, or, as is alleged here, filled the position with a [non-member of the protected class]." Walker v. Mortham, 158 F.3d 1177, 1192 (11th Cir. 1998) (emphasis added). Here, Ms. Brown has failed to demonstrate, first, that she applied for or should have been considered for an available position, and second, that she was denied a promotion into that position. Ms. Brown has thus failed to establish a prima facie case of gender discrimination.

For these reasons, the Court concludes that (1) insofar as Ms. Brown seeks to recover for Defendants' failure to promote her prior to June 15, 2000, her claims are

time-barred; and (2) insofar as Ms. Brown seeks to recover for a failure to promote her into a non-specified position after June 15, 2000, Plaintiff has failed to demonstrate a prima facie case. Accordingly, Defendant's motion for summary judgment on Ms. Brown's failure-to-promote claim is GRANTED.

b. Ms. Brown's Pay-Disparity Claim: June 15, 2000-March 25, 2001.

Additionally, Ms. Brown claims that she was the victim of discrimination with respect to her compensation. In particular, she states that she received only $36,500 per year in salary until March 25, 2001. After the issuance of the Task Force Report, Ms. Brown received a 24.1 % salary increase, taking her annual pay up to $43,500 per year. She asserts that she would have been receiving this increased rate of pay as early of June 2000 were it not for unlawful sex discrimination at Gold Kist.

Gold Kist responds, however, that Ms. Brown's last regular salary increase prior to March 25, 2001 occurred on September 26, 1999. Moreover, there is no evidence in the record that Ms. Brown was ever considered for a pay raise until the reorganization which took place on March 25, 2001.

As provided above, in Ledbetter, 127 S. Ct. at 2165, the Supreme Court held that, to succeed in a Title VII claim for pay disparity, a plaintiff must bring forth evidence of a "pay-setting decision . . . that occurs at a particular point in time." Id. Plaintiff has not alleged, much less brought forth evidence, that any decision to grant or deny Plaintiff a pay raise occurred between June 15, 2000 and March 25, 2001. Rather, the

undisputed evidence reflects that Plaintiff's salary of $36,500 was set on September 26, 1999, and remained until the reorganization of the I.S. Department on March 25, 2001. Because Ms. Brown has not come forth with any evidence of a discrete pay decision in the relevant time period, Plaintiff's pay-disparity claim with respect to the period between June 2000-March 24, 2001 is barred by the 180-day statute of limitations. Accordingly, Defendant's motion for summary judgment on this aspect of Ms. Brown's pay-disparity claim is GRANTED.

c. Ms. Brown's Pay Disparity Claim: March 26, 2001 Reorganization

Ms. Brown also claims that, after the March 2001 reorganization, and after she received a 24.1% salary increase to $43,500 per year, she was "paid less than Jeffrey Pinckard, even though they were on the same level, according to the organization chart that Sandra Kearney prepared." (Pls.' Resp. to Defs.' Mot. for Summ. J. [162-3] at 68-69.) Mr. Pinckard's salary was set well above Ms. Kearney's at $62,400. Ms. Brown also contends that, whereas she has the responsibility of supervising "another employee," "Mr. Pinckard was not supervising any employees... [because, a] s a part of the reorganization, Ms. Kearney had decided to move Jeffrey Pinckard to a non-supervisory position." (Id. at 69.)

But besides pointing out that Mr. Pinckard held a job on the "same level," and noting that Mr. Pinckard did not supervise other employees, Plaintiff has introduced no evidence upon which a reasonable factfinder could conclude that Plaintiff "shared the same type of tasks"

as Mr. Pinckard. B&B Cash Grocery, 975 F.2d at 1529). Absent this showing, Ms. Brown has failed to demonstrate a pima facie case of gender discrimination. Accordingly, Defendant's motion for summary judgment on this aspect of Ms. Brown's pay-disparity claim is GRANTED.[10]

4. Shauna Baugh

The final named Plaintiff, Shauna Baugh, began working at Gold Kist in 1993, and remains employed by the Company. Ms. Baugh is an administrative professional who began her career at Gold Kist as a Clerk/Typist, and who, at the beginning of the time period relevant to this litigation, had obtained the status of Secretary.

a. Ms. Baugh's Failure-to-Promote Claims

Plaintiffs allege in their Complaint that Ms. Baugh was not given a promotion to the position of Administrative Specialist V/Help Desk Analyst when the position became open in September 2000 as the result of Jeffrey Chambers resigning a similar position. Ms. Baugh contends that she was qualified for that position, citing her promotion to the role of Administrative Specialist V in March of 2001, following the issuance of the Task Force Report. Defendant moves for summary judgment on that claim, arguing that Ms. Baugh's failure-to-promote claims are time-barred, and, in the alternative, that Ms. Baugh was not qualified for the position of Administrative Specialist V/Help Desk Analyst until her promotion in March of 2001.

In discussing the claims of Ms. Baugh, Plaintiffs have

failed to respond to Defendant's arguments that her claims are time-barred and that Ms. Baugh was not qualified for the position of Administrative Specialist V prior to March of 2001. Plaintiffs do not contest, for example, that Ms. Baugh did not have experience in addressing complex technical problems over the phone, had not taken any computer-related courses, and did not have A+ certification or Help Desk 2000 certification. Mr. Chambers, on the other hand, had been trained in computers and received A+ certification. Having reviewed Defendant's unrefuted filings on this matter, the Court concludes that it is entitled to summary judgment on Ms. Baugh's failure-to-promote claims. Insofar as Defendant moves for summary judgment on that basis, that motion is GRANTED.

b. Ms. Baugh's Pay-Disparity Claim: June IS, 2000 - March 25, 2001

Ms. Baugh also claims to have been the victim of discrimination with respect to compensation. Ms. Baugh, however, besides generally arguing that the reorganization in March of 2001 "reflects that [Ms. Baugh] had been underpaid during the applicable limitations period," has not alleged, much less come forth with evidence of any pay decision that occurred between June 15, 2000 and March 25, 2001. For the same reasons as discussed above, Ms. Baugh's pay-disparity claim with respect to the period between June 15, 2000 and March 25, 2001 is barred by the 180-day statute of limitations. See Ledbetter, 127 S. Ct. at 2165. Accordingly, insofar as Defendant moves for summary judgment on that basis, that motion is GRANTED.

3. Ms. Baugh's Pay-Disparity Claim as of March 25, 2001 Reorganization

Ms. Baugh also claims that, following her promotion to Administrative Specialist V on March 19, 2001, which occurred as the result of the reorganization by Ms. Kearney, she was paid $1,200 less per year than Rafus Ellis, who had previously worked as a Computer Operator, and less than James Forrester, an allegedly similarly situated male employee on the same job level. Ms. Baugh was paid $32,300. Mr. Ellis had previously earned $33,500 per year, and Mr. Forrester was being paid $40,200 per year.

Defendant responds that Mr. Ellis is not a valid comparator to Ms. Baugh because he was a Computer Operator, and not a Secretary, and thus he performed different duties than Ms. Baugh, both before and after her promotion. For example, Defendant argues that Mr. Ellis's duties included computer maintenance, addressing technical computer issues at the Help Desk, and performing backup services; and in contrast, Ms. Baugh was primarily responsible for performing clerical work. Thus, Defendant argues, Ms. Baugh has failed to establish a prima facie case with respect to Mr. Ellis because he is not a valid comparator.

Furthermore, Defendant argues that James Forrester is not similarly situated to Ms. Baugh. While he shared a similar job title to Ms. Baugh, Defendants point out that Mr. Forrester was a long-term Gold Kist employee who had years of accounting and management experience. In fact, Mr. Forrester supervised Ms. Baugh and conducted Ms. Baugh's 2000 Performance Review. Prior to the March 2001 reorganization, Mr.

Forrester managed the clerical staff in the I. S. Department and was charged with the responsibility of budgeting within the department. After the reorganization, though Ms. Kearney determined that Mr. Forrester's previous position as a manager and supervisor was no longer needed, and recommended that his position be eliminated, Mr. Stimpert recommended that Ms. Kearney put Mr. Forrester into the position of I. S. Administrator, so that "he could stay with Gold Kist until he retired." (Kearney Dep. at 141-142.)

Ms. Baugh, on the other hand, was hired in 1993 by Gold Kist as a Clerk Typist. She later held the positions of Secretary, Administrative Specialist III, and Administrative Specialist V. Throughout her tenure with Gold Kist, Ms. Baugh performed clerical duties including word processing, office administration, "mail sorting, answering phones, routing calls . . ., sending/receiving/distributing faxes, copying documents, maintaining office supplies, scheduling meetings and conference rooms, coordinating travel arrangements, and updating phone lists." (Baugh Dep. at 10-30 & Ex. 37.) According to Ms. Kearney, though Ms. Baugh was promoted to the job title of "Administrative Specialist V" after the reorganization in March of 2001, her duties remained largely clerical.

As previously stated, alleged comparators "must perform jobs similar to the plaintiff's; thus, the plaintiff must show that, in her job, she `shared the same type of tasks' as the comparators." Cooper, 390 F.3d at 735 (11th Cir. 2004) (citing B&B Cash Grocery, 975 F.2d at 1529). Here, besides noting the job titles of Mr. Forrester and Mr. Ellis, Ms. Baugh has not introduced

any evidence to establish that she shared the same type of tasks as these other two individuals. Rather, the undisputed evidence of record demonstrates that Ms. Baugh performed principally clerical duties, whereas Mr. Ellis performed technical computer-related duties and Mr. Forrester performed managerial duties.

Because Ms. Baugh proffers no evidence in response to Defendant's evidence that she was not paid at the salaries of Mr. Ellis and Mr. Forrester because she was not qualified to perform the duties performed by those individuals-other than Ms. Baugh's own conclusory statements that she was as qualified as her counterparts and her comparison of job titles-no reasonable fact finder could conclude that Ms. Kearney's decision to pay Ms. Baugh less than several other males in her department was motivated by gender discrimination. Accordingly, insofar as Defendants' move for summary judgment on Ms. Baugh's disparate-pay claim, that motion is GRANTED.[11]

II. Defendants' Motion to Strike

Defendant moves to strike various aspects of Plaintiffs' statement of material facts for containing incomplete and argumentative responses to Defendant's statements of material facts. Because of the Court's resolution above, Defendant's Motion to Strike Portions of Plaintiff Debris Lundy's Statement of Disputed Material Facts [179]; Defendant's Motion to Strike Portions of Plaintiff Sue Cody's Statement of Disputed Material Facts [180]; Defendant's Motion to Strike Portions of Plaintiff Shauna Baugh's Statement of Disputed Material Facts [181]; and Defendant's Motion

to Strike Portions of Plaintiff Ozzie Brown's Statement of Disputed Material Facts [182] are DENIED as moot.

Conclusion

For the foregoing reasons, (i) Defendant's Motion for Summary Judgment on the Claims of Plaintiff Debris Lundy [149]; (ii) Defendant's Motion for Summary Judgment on the Claims of Plaintiff Sue Cody [150]; (iii) Defendant's Motion for Summary Judgment on the Claims of Plaintiff Ozzie Brown [151]; and (iv) Defendant's Motion for Summary Judgment on the Claims of Plaintiff Shauna Baugh [152] are GRANTED. The Court DIRECTS the Clerk to ENTER JUDGMENT in favor of Defendant and against all Plaintiffs in this action.

Defendant's Emergency Motion to Seal Documents [171] is GRANTED. Defendant's Motion to Strike Portions of Plaintiff Debris Lundy's Statement of Disputed Material Facts [179]; Defendant's Motion to Strike Portions of Plaintiff Sue Cody's Statement of Disputed Material Facts [180]; Defendant's Motion to Strike Portions of Plaintiff Shauna Baugh's Statement of Disputed Material Facts [181]; and Defendant's Motion to Strike Portions of Plaintiff Ozzie Brown's Statement of Disputed Material Facts [182] are DENIED as moot.

SO ORDERED this 28th day of June, 2007.

Footnotes

[1]According to the record, Gold Kist's I. S. Department is made up of approximately fifty employees.

[2] As the Court discusses in more detail below, because the Plaintiffs filed their relevant EEOC charge on December 12, 2000, the conduct in this case must have occurred on or after June 15, 2000, 180 days before the filing of the EEOC Complaint, to be considered timely. See 42 U.S.C. § 2000e-5(e).

[3]The EEOC initiated an inquiry into Plaintiffs' allegations of discrimination, and in connection with that investigation, sought what Gold Kist characterizes as "voluminous" amounts of discovery. When the EEOC and Gold Kist were not able to reach agreement respecting the appropriate contours of Gold Kist's discovery obligations, the EEOC issued determinations providing:

> A review of available records indicate salary and promotion disparities that affects [sic] women as a class. Furthermore, the evidence indicates the pattern and practice has continued after an alleged reorganization and reclassification of positions.
>
> The Respondent in this matter was provided two separate opportunities to respond to the allegations brought by the Charging Part[ies]. The Respondent was specifically informed that it risked an adverse determination should it not respond, and has chosen not to exercise its right to rebut the Charging Part[ies'] allegations.
>
> Inasmuch as the Respondent has been afforded every opportunity to respond to the charge of discrimination and has failed to do so, the Commission at this time determines that the Respondent has failed to meet its burden of

> proof, and that said silence is an admission of the allegations made and exercises its discretion to draw an adverse inference with respect to such.
>
> Based on this analysis, I have determined that the evidence obtained during the investigation establishes that it is more likely than not that the Charging Part[ies] as well as the class [were] discriminated against in violation of the statute.

(See Am. Compl. Par. 26 & Ex. B; Answer Par. 26.)

[4]Plaintiffs do not advance any evidence or argument indicating that their case may rest on "direct evidence" of gender discrimination. Moreover, even if Plaintiffs were to argue that the Task Force Report constitutes "direct evidence," the Court would reject such a contention, since the aggregated subjective opinions of company employees reflect, at best, a collective inference of discrimination, and not direct evidence of "'remarks [by an employer]. . . whose intent could mean nothing other than to discriminate on the basis of' ome impermissible factor." Wilson v. B/E Aerospace, Inc., 376 F.3d 1079, 1086 (11th Cir. 2004) (quoting Rojas v. Florida, 285 F.3d 1339, 1342 n.2 (11 th Cir. 2002)).

[5]Ms. Lundy may not bring suit for the claims she alleged in her April 2000 EEOC charge because she failed to file suit within 90 days of receipt of her Notice of Rights on that charge. 42 U.S.C. § 2000e-5(f)(1).

[6]Although Defendant does not raise the issue, it also appears that Ms. Lundy's disparate-pay claim arising out of the March 2001 reorganization is procedurally barred because it is outside the scope of the EEOC charge filed in December of 2000. A "plaintiff s judicial complaint is limited by the scope of the EEOC investigation which can reasonably be expected to grow

out of the charge of discrimination." Gregory v. Georgia Dept. of Human Resources, 355 F.3d 1277,1279-80 (11th Cir. 2004) (quoting Alexander v. Fulton County, 207 F.3d 1303, 1332 (11th Cir. 2000)). Here, Ms. Lundy's complaint alleges a discrete act of discrimination that occurred after the filing of the EEOC charge. Thus, it appears to be procedurally barred. See Stuart, 152 F. App'x at 801 (holding that failure-to-promote claim of plaintiff, who included two instances of failure to promote in EEOC charge, but added third instance in his judicial complaint which allegedly occurred after the filing of the charge, was procedurally barred).

[7]To the extent that Ms. Cody alleges Title VII violations with respect to the promotions of Mr. Curtis Whitworth "in the 1990s" and Mr. Jack Thompson "in the early 1990s," or any other promotion decisions made prior to June 15, 2000, those claims are time-barred.

[8]Ms. Cody also points to testimony by Mr. Stimpert, in which he read aloud notes from the Task Force meeting suggesting the Task Force "had received information that the female employees' problems were particularly with Mr. Boyd and Mr. Pinckard ... [who] made derisive comments about women, and [who] needed sensitivity training." (Pls.' Opp. at 60. (citing Stimpert Dep. 42, 82, 85).) This very generalized hearsay testimony does not, in the Court's view, call into question the reasons proffered by Mr. Boyd for recommending and selecting Mr. Mitchell over Ms. Cody.

[9]Although Defendant does not raise the issue, it also appears that Ms. Cody's disparate-pay claim arising out of the March 2001 reorganization is procedurally barred because it is outside the scope of the EEOC charge filed in December of 2000. See supra at 27 n.6.

[10]Although Defendant does not raise the issue, it also appears that Ms. Brown's disparate-pay claim arising

out of the March 2001 reorganization is procedurally barred because it is outside the scope of the EEOC charge filed in December of 2000. See supa at 27 n.6.

[11]Although Defendant does not raise the issue, it also appears that Ms. Baugh's disparate-pay claim arising out of the March 2001 reorganization is procedurally barred because it is outside the scope of the EEOC charge filed in December of 2000. See supra at 27 n.6.

CIVIL ACTION NO. 1:03-CV-0745-RWS
IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

SUE CODY, OZZIE BROWN, DELORIS LUNDY
and SHAUNA BAUGH,
Plaintiffs,
v.
GOLD KIST, INC.,
Defendant.

J U D G M E N T

This action having come before the court, Honorable Richard W. Story, United States District Judge, for consideration of defendant's Motions for Summary Judgment, and the court having granted said motions, it is Ordered and Adjudged that the plaintiff take nothing; that the defendant recover its costs of this action, and the action be, and the same hereby, is dismissed.

Dated at Atlanta, Georgia, this 29th day of June, 2007.

7/14/2008
No. 07-13494
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

SUE CODY, OZZIE BROWN, DELORIS LUNDY, SHAUNA BAUGH, individually and on behalf of all others similarly situated,
Plaintiffs-Appellants,

versus

GOLD KIST, INC.,
Defendant-Appellee

ORDER

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, the Petition(s) for Rehearing En Banc are DENIED.

SUGGESTION

126

(2)

ORIGINAL

NO. 08-786

IN THE
SUPREME COURT OF THE UNITED STATES

SUE CODY, et al.,

Petitioners,

v.

GOLD KIST INC.,

Respondent.

Supreme Court, U.S.
FILED
JAN - 5 2009
OFFICE OF THE CLERK

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NOTICE OF SUGGESTION OF BANKRUPTCY

OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.
KEVIN P. HISHTA
600 Peachtree Street, NE
Suite 2100
Atlanta, GA 30308
(404) 881-1300

Counsel for Respondent

CORPORATE DISCLOSURE STATEMENT

On December 27, 2006, Pilgrim's Pride Corporation, a publicly held company, acquired Gold Kist Inc. After the acquisition, the name Gold Kist Inc. was changed to Pilgrim's Pride Corporation of Georgia, Inc. On August 30, 2007, Pilgrim's Pride Corporation of Georgia, Inc. was merged with and into Pilgrim's Pride Corporation, Pilgrim's Pride Corporation being the surviving corporation. Pilgrim's Pride Corporation has no parent corporations nor are there any publicly held companies that own 10% or more of its stock.

NOTICE OF SUGGESTION OF BANKRUPTCY

PLEASE TAKE NOTICE that on December 1, 2008, Pilgrim's Pride Corporation (into which Gold Kist Inc. was previously merged with and into)[1] and its debtor affiliates (the "Debtors"), filed voluntary petitions under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") in the United States Bankruptcy Court, Northern District of Texas (the "Bankruptcy Court"). The Debtors' cases are being jointly administered under Case No. 08-45664-(DML).

11 U.S.C. § 362(a)(1) provides that the filing of a voluntary petition operates as a stay, applicable to all entities, of the continuation, including the issuance or employment of process, of a judicial action or proceeding against the debtor that was or could have been commenced before the filing of the petition, or to recover a claim against the debtor that arose before the filing of the petition.[2]

PLEASE TAKE FURTHER NOTICE that the Debtors reserve their right to bring an action in the Bankruptcy Court for any violation of the automatic stay under section 362(a) of the Bankruptcy Code.

---

[1] Specifically, on December 27, 2006, Pilgrim's Pride Corporation acquired Gold Kist Inc. After the acquisition, the name Gold Kist Inc. was changed to Pilgrim's Pride Corporation of Georgia, Inc. On August 30, 2007, Pilgrim's Pride Corporation of Georgia was merged with and into Pilgrim's Pride Corporation, Pilgrim's Pride Corporation being the surviving corporation.

[2] By correspondence and notice dated December 9, 2008, Petitioners have previously been apprised of Pilgrim's Pride Corporation's voluntary petitions.

Respectfully submitted this 5th day of January, 2009.

Kevin P. Hishta
Counsel of Record
OGLETREE, DEAKINS, NASH
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Counsel for Respondent
Gold Kist Inc. (now Pilgrim's Pride
Corporation)

Certificate of Service

I have served the aforementioned Notice of Suggestion of Bankruptcy by sending a copy via first-class, U.S. mail, postage prepaid to all parties required to be served as follows:

Marina Tramontozzi
Counsel of Record for Petitioners
c/o Marx & Marx, LLC
5555 Glenridge Connector
Suite 200
Atlanta, GA 30342
Phone: (404) 261-9559

Robert N. Marx
Marx & Marx, LLC
5555 Glenridge Connector
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Atlanta, GA 30342
Phone: (404) 261-9559

This 5th day of January, 2009

Kevin P. Hishta

Ogletree Deakins

OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.

Attorneys at Law

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Kevin P. Hishta
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January 5, 2009

Via Federal Express

Clerk
Supreme Court of the United States
Washington, DC 20543

Re: Case No. 08-786

To Whom It May Concern:

Enclosed please find an original and 11 copies of a Notice of Suggestion of Bankruptcy in the above-referenced case. Please file the original and 10 copies and return one copy, file stamped to me in the enclosed self-addressed, stamped envelope. Thank you.

Very truly yours,

Kevin P. Hishta
KPH:mr
Encls.